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In the Supreme Court of the United States

OCTOBER TERM, 1976

76-1868

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 388

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 388

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 548 F. 2d 704. The decision and order of the National Labor Relations Board (App. C, *infra*) are reported at 220 NLRB 665.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*) was entered on January 28, 1977. On April 18, 1977, Mr. Justice Stevens extended the time for filing a petition for a writ of certiorari to and including June 27, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the 10-day notice requirement of Section 8(g) of the National Labor Relations Act is applicable to any labor organization engaging in a strike or picketing at a health care institution, or only to labor organizations picketing or striking in a dispute with the health care institution concerning its employees.

STATUTE INVOLVED

Section 8(g) of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. (1970 ed. and Supp. V) 151, *et seq.*), added to the Act by the 1974 health care amendments (88 Stat. 395), reads as follows:

> Section 8(g). A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by

> this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of section 8(d) of this Act. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.

Other relevant portions of the Act are set forth in Appendix E, *infra*, pp. 64a-68a.

STATEMENT

St. Joseph's Hospital of Marshfield, Inc. (herein "the Hospital"), a private non-profit hospital in Marshfield, Wisconsin, entered into a contract with Hoffman Company, Inc. to construct a laboratory addition to be connected to the Hospital by a corridor and common wall. The Hospital also executed a direct contract with Thomas Electrical Services, Inc. to perform the electrical work on the laboratory project. (App. C, *infra*, pp. 24a-25a.)

On or about February 11, 1975, respondent Union placed two pickets at the entrance to the Hospital's delivery area. The pickets were on Hospital premises directly across from the Hospital building and adjacent to a parking lot provided for the employees of the Hospital. (App. C, *infra*, p. 26a; A. 11-12, 20.)[1]

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[1] After two hours, the pickets were moved to the corner of a city street about 350 feet from the Hospital. Pickets remained at this location until approximately February 27,

The pickets' signs stated:

> I.B.E.W.
> International Broth. of Elec. Workers
> L. U. #388
> Our only dispute is with the substandard wage, substandard benefits paid to employees of Thomas Electric

The Union continued to picket until approximately April 15, 1975, when Thomas ceased all daytime operations and limited its work at the jobsite to nighttime operations. Shortly thereafter the picketing ceased. (App. C, *infra*, p. 26a; A. 12.)

No Hospital employees refused to work as a result of the picketing, nor did the picketing have any adverse impact on the Hospital's ability to provide customary medical services. However, employees of contractors engaged in the construction of the laboratory project did, on various occasions, refuse to work during the picketing, causing intermittent work stoppages at the project (App. C, *infra*, p. 26a; A. 12-13).

The Union did not serve written notice on either the Hospital or the Federal Mediation and Conciliation Service ("FMCS") of its intent to engage in the picketing at the Hospital (App. C, *infra*, p. 26a; A. 12).

1975, when they were moved back to their original location directly opposite the Hospital. (A. 12.)

"A." references are to the appendix to the briefs in the court below. A copy has been lodged with the Clerk of this Court.

Upon a charge (A. 21) filed by the prime contractor, Hoffman, the Board held (one member dissenting) that the Union violated Section 8(g) of the Act by picketing at the Hospital without first giving ten days' written notice (App. C, *infra*, pp. 26a-27a, 30a). The Board followed its earlier decisions in *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 630, AFL-CIO (Lein-Steenberg)*, 219 NLRB 837 (App. D, *infra*, pp. 32a-57a), and *Laborers' International Union of North America, AFL-CIO, Local Union No. 1057 (Mercy Hospital of Laredo)*, 219 NLRB 846 (App. D, *infra*, pp. 58a-63a).[2] In those cases, the Board concluded (App. D, *infra*, p. 39a; footnote omitted):

> Congress intended us to interpret Section 8(g) according to its plain language and * * * therefore, *any* strike or picketing at the premises of a health care institution, even primary reserved gate picketing directed at a subcontractor, is proscribed in the absence of proper notices.

The Board ordered the Union to cease and desist from the unfair labor practice found, and to post appropriate notices (App. C, *infra*, pp. 28a-29a).

The court of appeals denied enforcement of the Board's order. The court noted that the issue was

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[2] These decisions were rendered by the full Board, members Fanning and Jenkins dissenting. They are presently pending in the Court of Appeals for the District of Columbia Circuit on the petitions for review and enforcement (Nos. 75-1854 and 75-1859).

"one of statutory construction," *i.e.*, whether Section 8(g) applies "only to unions directing concerted activity at the health care institution, purportedly on behalf of the employees of the institution, or is it also applicable to unions * * * which represent employees of others, not involved in any dispute with a health care institution, but, whose labor activities take place on the premises of the institution?" The court acknowledged that "[t]here is much to be said for both views," but concluded, based on its analysis of the language of Section 8(g), the legislative history of the health care amendments to the Act, and the interaction of Section 8(g) with the other health care provisions, that Section 8(g) applies "only to unions representing health care institution employees" (App. A, *infra*, pp. 5a-6a; footnotes omitted).[3]

REASONS FOR GRANTING THE WRIT

The question whether Section 8(g) of the National Labor Relations Act (the Act) applies to labor organizations that represent non-health care employees performing construction or other work at a health care institution is important in the administration of the Act. The Board's view that the ten-day notice requirement of Section 8(g) applies to all strikes and picketing at a health care institution by a labor organiza-

[3] The court left open the question "whether employees engaged in work activities necessary to the present operation of a health care institution, but not employed directly by the institution, should be deemed health care employees" (App. A, *infra*, p. 6a, n. 5).

tion, and not merely to those that involve health care institution employees, effectuates Congress' basic intent in the 1974 health care amendments to the Act to insulate health care institutions from surprise strikes and picketing that would endanger the health and welfare of the patients. The court below thus erred in refusing to accept the Board's interpretation of Section 8(g).

There is a large volume of construction work involving additions to or remodeling of existing health care institutions, and thus many potential labor disputes, with attendant strikes or picketing, at health institution premises. The question whether Section 8(g) applies to such strikes or picketing has already led to other cases before the Board and the courts (see cases cited *supra*, p. 5). In light of the serious consequences to the union and the striking employees of the union's failure to give the notice required by Section 8(g),[4] it is important that the obligation imposed by that Section be authoritatively established. In these circumstances, the issue now warrants resolution by this Court.

1. The National Labor Relations Act was amended, effective August 25, 1974, to extend its coverage to

[4] Section 8(d) of the Act, 29 U.S.C. 158(d), provides that any employee who engages in a strike within the notice period loses his status as an employee for the purposes of Sections 8, 9 and 10 of the Act. See App. E, *infra*, 65a-66a. The union is subject to the sanctions against unfair labor practices if it engages in a strike or picketing without complying with Section 8(g). See S. Rep. No. 93-766, 93d Cong., 2d Sess. 4 (1974) ("S. Rep.").

nonprofit hospitals, which had previously been excluded from the statute.[5] Act of July 26, 1974, 88 Stat. 395 (the "health care amendments"). At the same time that it brought the operations of these institutions under the Act, Congress modified other parts of the Act in recognition of the special need to assure the continuity of patient care, not only at nonprofit hospitals, but also at other health care institutions.[6]

One such modification was the addition of Section 8(g) to the Act.[7] That Section provides that:

> A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of section 8(d) of this Act. The notice shall state the date and time that such action will commence. The notice,

[5] Section 2(2) of the Act, 29 U.S.C. 152(2), had excluded from the definition of "employer" "any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual." That exclusion was deleted; a new provision, Section 2(14), 29 U.S.C. (Supp. V) 152(14), reads:

> The term "health care institution" shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person.

[6] These other health care institutions were already covered by the Act. They included proprietary hospitals (*Butte Medical Properties d/b/a Medical Center Hospital*, 168 NLRB 266); nursing homes (*University Nursing Home, Inc.*, 168 NLRB 263; *Drexel Home, Inc.*, 182 NLRB 1045); medical clinics (*Mayo Clinic*, 168 NLRB 557; *Ochsner Clinic*, 192 NLRB 1059); physicians' partnerships providing services to health plans or out-patient clinics (*Kaiser Foundation Hospitals*, 210 NLRB 949; *Permanente Medical Group*, 187 NLRB 1033); home nursing services (*Visiting Nurse Association*, 188 NLRB 155); and blood bank programs (*American National Red Cross*, 211 NLRB 587).

[7] Other modifications reflect the same concern. Thus, Section 8(d) of the Act, 29 U.S.C. (and Supp. V) 158(d), was amended so that the requirement for notice to the other party of a proposed termination or modification of an existing contract with a health care institution is 90 days (rather than the usual 60 days), and notice to the Federal Mediation and Conciliation Service (FMCS) and state agencies regarding such actions is 60 days (rather than the usual 30 days); the FMCS and state agencies must also be given 30 days' notice of a dispute arising in connection with bargaining for an initial contract with a health care institution; mediation by the FMCS in both initial and subsequent contract disputes with health care institutions is mandatory (rather than permissive). By virtue of the remaining provisions of Section 8(d), which were not changed, the parties are required, until the notice period has expired, to continue an existing contract in full force and effect without resorting to strike or lockout, and any employee who engages in a strike within any of the specified notice periods loses his status as an employee (Section 8(d), as amended, App. E, *infra*, pp. 65a-66a).

In addition, a new provision, Section 213, was added to Title II of the Labor Management Relations Act (App. E, *infra*, pp. 67a-68a), which empowers the FMCS to convene, within the notice periods specified in Section 8(d), a Board of Inquiry to make recommendations for settling a dispute over contract terms, if a threatened or actual strike or lockout affecting a health care institution would substantially interrupt the delivery of health care in a locality.

once given, may be extended by the written agreement of both parties.

Any employee "who engages in any strike within the appropriate period specified in [Section 8(g)]" loses his status as an employee (Section 8(d), App. E, *infra*, pp. 65a-66a).

2. By its terms, Section 8(g) applies to "any strike, picketing or other concerted refusal to work at any health care institution" engaged in by a labor organization. Read literally, this language encompasses all strikes, picketing, or concerted refusals to work at a health care institution by a labor organization, whether or not the dispute involves employees of the health care institution.

But even if the court of appeals was correct in concluding that the statutory language is "equivocal" (App. A, *infra*, p. 7a),[8] it should have accepted the Board's interpretation, which constitutes a contempor-

[8] Although it recognized that "picketing . . . at a health care institution" implies activity on the premises of the institution, it also concluded that "when we read the phrase 'strike . . . at a health care institution' or 'refusal to work at a health care institution,' we tend to think more narrowly of activity involving a group of employees and the health care institution that employs them' (App. A, *infra*, p. 7a). But when the picketing here caused a work stoppage by the employees of the contractors working at the hospital on the laboratory project, those employees were engaging in a refusal to work at a health care institution quite as clearly as if they had been employees of the hospital. If Congress had intended Section 8(g) to cover only strikes or refusals to work by employees of health care institutions, it could have employed language so specifying, as it did, for example, in the Section 8(d) reference to "collective bargaining [which] involves employees of a health care institution" (App. E, *infra*, p. 66a).

aneous construction of the 1974 amendments to the Act by the agency entrusted with the task of administering them. See *Udall* v. *Tallman*, 380 U.S. 1, 16; *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315; cf. *Bayside Enterprises, Inc.* v. *National Labor Relations Board*, No. 75-1267, decided January 11, 1977, slip op. 5-7. Moreover, that interpretation results in a principle that clearly informs all labor organizations of their obligations under the statute before they have acted, so that they and the employees whom they represent are not required to risk unfair labor practice liability and a loss of employee status (see *supra*, p. 7) if they guess wrong as to whether their relation to the health care institution is sufficiently close to make them the equivalent of health care employees.[9]

Most importantly, the Board's interpretation best effectuates the basic congressional objective of safeguarding against disruptions in patient care.[10] Congress concluded (S. Rep. 4):[11]

[9] The court below recognized that there might be situations in which "employees engaged in work activities necessary to the present operation of a health care institution, but not employed directly by the institution, should be deemed health care employees" (App. A, *infra*, p. 6a, n. 5).

[10] It does so without adversely affecting any significant union or employee interests. As the court below conceded, "a ten-day notice requirement is not an oppressive burden to place on a union" (App. A, *infra*, p. 19a).

[11] The 1974 health care amendments were patterned largely on S. 3203, 93d Cong., 2d Sess., introduced in the Senate on March 20, 1974, 120 Cong. Rec. 7383 (1974); Legislative

> It is in the public interest to insure the continuity of health care to the community and the care and well being of patients by providing for a statutory advance notice of any anticipated strike or picketing. * * *

Strikes or picketing at a health care institution may disrupt the continuity of patient care even where the dispute does not involve health care institution employees, since the health care institution employees may be induced to respect the picket line, the picketing may deter the delivery of essential supplies to the health care institution, or it may delay the completion of a needed facility (*e.g.*, the laboratory here). In such a situation, the institution's operations are disrupted just as they would be if its own employees initiated a strike. Nor is the ten-day notice, required by Section 8(g), an idle symbol when proffered by a union representing non-health care employees. Its receipt by the health care institution allows time to set up a separate gate or take other measures to reduce the impact of the dispute on health care employees or those providing necessary services, and permits the FMCS to attempt to mediate the dispute.

3. The court of appeals acknowledged that there is "much to be said" for the Board's view of Section 8(g), and that "the Board has properly identified the Congressional goal to be attained through Section 8(g)" (App. A, *infra*, pp. 6a, 18a). It nevertheless

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History of the Coverage of Non-profit Hospitals Under The National Labor Relations Act, 1974, prepared by the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate 1 (1974) ("Leg. Hist.").

rejected the Board's views for reasons which, we submit, are unpersuasive.

a. Recognizing that the legislative history of Section 8(g) is ambiguous, the court found that the lack of any reference to non-health care employees in the debates and hearings tended to support a narrow reading of the statute (App. A, *infra*, p. 12a). We submit that it is more significant that the legislative history as a whole indicates instead that Congress intended to express in Section 8(g) the requirement that ten days' notice precede *any* strike, picketing, or refusal to work on the premises of a health care institution.

The Senate Report, in explaining the purpose of the notice period in Section 8(g), specifically stated that the notice would provide an opportunity to determine whether the picketing would be in violation of Section 8(b)(4) (S. Rep. 4; Leg. Hist. 11). That Section (29 U.S.C. 158(b)(4)) prohibits secondary boycotts. Although a union representing health care employees might conceivably engage in a secondary boycott at a health care institution as a means of seeking recognition or a contract for its members,[12] a far more likely situation would be where a stranger-union, *e.g.*,

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[12] For example, the court of appeals postulated (App. A, *infra*, p. 20a, n. 15) that "the secondary activity with which the Senate was concerned was that involving the employees of one health care institution, who would carry their protest against their own employer to the site of an institution to which their employer had moved patients." There is, however, nothing in the pertinent text of the Senate Report to justify the court's speculation that congressional concern was so narrowly based.

a union representing construction workers on the premises or delivery men who made deliveries at the hospital, attempted to obtain the support of hospital employees in its dispute with another employer.

Moreover, the legislative history is replete with statements that Section 8(g) requires notice to the health care institution involved before a labor organization engages in *any* picketing, strike, or concerted refusal to work (see, *e.g.*, S. Rep. 4, Leg. Hist. 11; H. R. Rep. No. 93-1051, 93d Cong., 2d Sess. 5 (1974), Leg. Hist. 273; S. Rep. 1-2, Leg. Hist. 8-9; 120 Cong. Rec. 12934 (1974), Leg. Hist. 85; 120 Cong. Rec. 12939 (1974), Leg. Hist. 98-99).[13]

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[13] Section 8(g) was derived from an earlier bill, S. 2292, 93d Cong., 1st Sess. (1973), Leg. Hist. 449. See 119 Cong. Rec. 26792 (1973), Leg. Hist. 115. Section 8(g)(3) of S. 2292, Leg. Hist. 456-457, provided that, with certain exceptions:

> it shall be an unfair labor practice for any labor organization to engage or participate in * * *, or to induce or encourage any individual to engage or participate in, (i) a strike or work stoppage of any kind whatsoever, or for any reason whatsoever, against a health care institution, or (ii) any picketing of any kind for any purpose of, or at the premises of, a health care institution * * *.

The language of this provision thus encompasses all strikes or picketing by a labor organization at a health care institution, and not merely those by a labor organization representing health care institution employees. Section 8(g), as enacted, does not completely outlaw such activity, but instead conditions it upon giving the health care institution sufficient prior notice to enable it to protect against a disruption of patient care. In making this change, there is no indication that Congress also desired to narrow the reach of Section 8(g)(3) of S. 2292, so as to exempt labor organizations representing non-health care employees from regulation altogether.

b. The court below also found it "neatly consistent with the overall purpose of extending the protection of the National Labor Relations Act to employees of health care institutions" to limit Section 8(g)'s notice requirement to the "newly-protected concerted activity of such employees," rather than concluding that the notice requirement also affected previously protected activities (App. A, *infra*, p. 10a). That analysis misreads the amendments. Many employees of health care institutions were covered before the amendments; employees of non-profit hospitals were not. But in enacting the amendments Congress was not concerned simply with non-profit hospitals and their employees. Instead, the amendments focused on the needs of health care institutions as a class for special procedures to safeguard against disruptions of patient care caused by labor disputes. 120 Cong. Rec. 22574 (1974), Leg. Hist. 360. Thus, although employees of proprietary hospitals and nursing homes were previously protected by the Act, Section 8(g) clearly qualifies their pre-existing statutory rights in the interest of assuring the continuity of patient care. For precisely the same reason, Section 8(g) also qualifies the pre-existing statutory rights of other unions and workers on the premises of health care institutions.

c. Finally, the court below believed that, "were we to accept the Board's interpretation of Section 8(g), we would be ascribing to Congress the intention of requiring any labor organization contemplating activity at a health facility to serve ten-day notice on the

Federal Mediation and Conciliation Service though 8 (d) (1) makes clear that the FMCS would be powerless to require meetings between the disputing parties unless employees of a health care institution were involved" (App. A, *infra*, p. 17a).

But the fact that the FMCS may be "powerless to require meetings" is hardly a reason to conclude that no purpose is served by requiring that it be notified. Such notification may prompt an effort by the FMCS to mediate or conciliate the dispute on a voluntary basis, as it does in disputes involving industries other than health care. Indeed, Congress evidently intended the notice provision to serve precisely this purpose here. Section 8(d) gives the FMCS a mandatory mediation role in disputes involving health care institutions only if the dispute is over contract negotiations, while Section 8(g) requires notice to the FMCS of *all* strikes or picketing by a labor organization at a health care institution, and not merely those that occur in connection with contract negotiations. Even under the court's interpretation of Section 8(g), picketing by a union representing health care employees over a matter not involving contract negotiations would be subject to the notice requirement of that Section although the notice to the FMCS would not invoke the mandatory Section 8(d) procedure.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1977.

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 75-2152

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 388, RESPONDENT

Application for Enforcement of an Order
of the National Labor Relations Board

Argued September 30, 1976

Decided January 28, 1977

Before FAIRCHILD, *Chief Judge*, TONE and BAUER, *Circuit Judges.*

FAIRCHILD, *Chief Judge.* This case is brought by the National Labor Relations Board seeking enforcement of its order of September 25, 1975, against the International Brotherhood of Electrical Workers Local

Union No. 388. The Board has found the Union in violation of Section 8(g) of the National Labor Relations Act as a result of its picketing at St. Joseph's Hospital without first giving the ten day notices required by that section of the Act.[1] Its order requires Local 388 to cease and desist from this unfair labor practice and to post copies of a notice, signed by its authorized representative, at its business offices and meeting halls, assuring that no further violations of Section 8(g) will ensue. For the reasons set forth below, we have decided to deny the Board's request for enforcement of this order.

The Picketing at St. Joseph's Hospital

St. Joseph's Hospital is a private non-profit hospital located in Marshfield, Wisconsin.[2] In 1974 the hospital contracted with Hoffman Company, Inc. for construction of a laboratory building to be connected to the main hospital facility by a common wall and

[1] Section 8(g) of the National Labor Relations Act, 29 U.S.C. § 158(g), provides in pertinent part that:

> A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention. . . .

[2] The facility qualifies as a "health care institution" under Section 2(14) of the National Labor Relations Act, 29 U.S.C. § 152(14), which provides that:

> The term "health care institution" shall include any hospital, convalescent hospital, health maintenance organization, health clinic, extended care facility, or other institution devoted to the care of sick, infirm or aged persons.

corridor. In connection with the planned expansion, St. Joseph's executed a direct contract with Thomas Electrical Services, Inc. to perform all necessary electrical work on the laboratory project.

On or about February 11, 1975, members of Local 388 began an area standards picket action against Thomas, establishing two pickets at St. Joseph's Court, the Hospital's delivery access street.[3] The picketing was thus on hospital property, directly across from the existing hospital building and directly adjacent to a parking lot provided for the employees of the hospital. After approximately two hours, the Union moved the pickets from the delivery access street to the corner of a city street on the perimeter of hospital grounds. They remained at this location until approximately February 27, 1975, when they were moved back to their original position at the delivery access street. The picketing at this spot continued until April 15, 1975. As a result, employees of other contractors engaged in construction of the laboratory project at various times refused to work during the picketing. There is no allegation, however, that any hospital employees ceased work as a result of the picketing, or that the picketing had any adverse impact on the hospital's ability to provide its customary

[3] The picket signs carried by the Union members bore the legend:

> I.B.E.W.
> International Broth. of Elec. Workers
> L. U. #388
> Our only dispute is with the substandard wage, substandard benefits paid to employees of Thomas Electric.

medical services. Picketing ultimately forced Thomas to cease all daytime operations and to limit its work on the jobsite to night time.

The Union's picketing was commenced and continued without the service of Section 8(g) notice upon either St. Joseph's Hospital or the Federal Mediation and Conciliation Service. On February 20, 1975, the Hoffman Company brought this fact to the attention of the Board in a charge filed against Local 388. The Union, which at this time was picketing on the city street corner at the hospital's perimeter, responded by writing to St. Joseph's on February 21, 1975, informing the hospital that it had no dispute with the health care institution and that the only purpose of the picketing was to publicize the substandard wages and benefits provided by Thomas. In its letter, the Union refused to concede the applicability of Section 8(g) to its area standards picketing of Thomas but noted that, if there were any notice obligation under the Act, its failure to comply was strictly an oversight. Neither at this time, nor when the pickets were moved back to the delivery access street, nor at any time through April 15, however, did the Union serve formal 8(g) notice on the hospital or on the Federal Mediation and Conciliation Service. Thus, on April 1, 1975, the Hoffman Company filed another charge against Local 388 with the Board. The parties having stipulated to the above-outlined facts, the Board considered the case and, on September 25, 1975, issued the order against Local 388 that it now seeks to have enforced.

The Applicability of Section 8(g) to the Union's Picketing at St. Joseph's Hospital.

The particular issue confronting the court in this case is one of statutory construction, specifically: When Section 8(g) requires ten day notices to be filed by "a labor organization . . . engaging in any strike, picketing or other concerted refusal to work at any health care institution," does the section apply only to unions directing concerted activity at the health care institution, purportedly on behalf of the employees of the institution, or is it also applicable to unions such as Local 388 which represent employees of others, not involved in any dispute with a health care institution, but, whose labor activities take place on the premises of the institution? [4] There

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[4] The resolution of this issue involves this court in its first interpretation of Section 8(g). In fact, it seems that no federal court has yet ruled on the scope of the applicability of 8(g). The Board itself, however, on two prior occasions, in 3 to 2 decisions, the reasoning in which has been incorporated by reference into the Board's instant order, ruled that the notice provision of 8(g) would apply to *any* labor union activity directed at *any* employer if the activity took place on the premises of a hospital. *See United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 630, AFL-CIO (Lein-Steenberg)*, 219 NLRB No. 153, 89 LRRM 1770 (1975); *Laborers' International Union of North America, AFL-CIO, Local No. 1057 (Mercy Hospital of Laredo)*, 219 NLRB No. 154, 89 LRRM 1777 (1975). Review of both cases is currently pending in the D.C. Circuit (Nos. 75-1854 and 75-1859). We are not unmindful of the respect courts have often shown administrative agencies in their construction of statutes and regulations. *See e.g., Udall* v. *Tallman*, 380 U.S. 1, 16 (1964). But, as Professor Davis has noted, courts just as often sub-

is much to be said for both views, but, in the end, we conclude that 8(g) does apply only to unions representing health care institution employees.[5]

A. *The Language of Section 8(g)*

We have considered a number of factors in reaching this conclusion, the first being the language of the amendment itself. In the briefs filed by the parties, there is much discussion of the plain meaning of Section 8(g) and particularly of the word "at" in the phrase, "engaging in any strike, picketing or

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stitute their judgment for that of agencies, particularly when the issues involved "govern whole classes of cases instead of those that affect only individual cases." *See generally* K. Davis, *Administrative Law Treatise* §§ 30.07-30.14. We believe this to be such a case. The construction given "strike, picketing or refusal to work at a health care institution," which does not depend on the facts in this particular case, will create or eliminate a whole class of potential 8(g) cases. *Cf. Office Employees* v. *NLRB*, 353 U.S. 313 (1957) (in which the Court readily substituted its judgment for that of the Board on the general question of whether a labor organization which has employees is an "employer" under the Act.) Moreover, despite the deference to be given administrative agencies, a court may not abdicate its independent responsibility to construe statutory language. *See FTC* v. *Miller*, —— F.2d —— (7th Cir., January 24, 1977) (Slip Op. No. 76-1499 at 8), and cases there cited.

[5] The facts of the instant case do not require us to reach the issue of whether employees engaged in work activities necessary to the present operation of a health care institution, but not employed directly by the institution, should be deemed health care employees. The parties are in apparent agreement that the activities of the employees involvd in the instant case were in no way necessary to the present delivery of health care by St. Joseph's Hospital.

refusal to work *at* any health care institution." The Board argues that "at" refers to the location of the labor activity with reference to the property of the health care institution, and therefore, that any strikes, picketing, etc., occurring on the premises of the institution by any union, regardless of the employer or labor dispute involved, should be covered. The Union's position, however, is that "at" refers to the target at which strikes, picketing, etc. are directed, so that only unions directing their protests against the health care institution, *i.e.*, only unions purportedly representing employees of the health care institution, should be covered.

Quite frankly, we find the language of the amendment equivocal, and cannot accept either of the positions outlined as the "plain meaning" of 8(g). While we believe the common understanding of the word "at" to be related to location, we do not believe the language of 8(g) offers much guidance in helping us decide whether the location we are to focus on is (1) the one where a labor activity takes place, or (2) the one where the persons on whose behalf the activity is undertaken are employed. When we read the phrase "picketing . . . at a health care institution," we tend to think in broad terms of physical activity taking place on the premises of a health care institution. But, when we read the phrase "strike . . . at a health care institution" or "refusal to work at a health care institution," we tend to think more narrowly of activity involving a group of employees and the health care institution that employs them. We do

not, however, believe that the sentence structure of 8(g) will tolerate an interpretation of the word "at" that shifts the location meant from place of employment to place of activity and back again. The preposition serves as a common link between all three forms of labor protest and the health care institution involved,[6] and thus, we believe, must have a common meaning applicable in all three contexts.

It accordingly proved necessary for the court to look outside the statutory language for guidance in choosing a uniform meaning for the word "at," and thereby in determining the scope of union activity covered by Section 8(g).

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[6] This court cannot accept the position of the dissenting board members in the *Lein-Steenberg* and *Mercy Hospital of Laredo* cases, *supra*, note 4, to the effect that the preposition "at," when used in Section 8(g), was meant to apply only to the last-mentioned labor activity, *i.e.*, "refusal to work at." They explained:

> One can "picket" a health care institution but not "refuse to work a health care institution." Thus, if Congress had chosen not to include a prohibition against "other concerted refusals to work" but had limited itself to prohibiting striking and/or picketing, the word "at" would not be necessary.

But 8(g) does not use the term striking or picketing a health care institution. The section refers to "engaging in any strike, picketing or refusal to work at a health care institution." While one can indeed "strike a health care institution," or be "picketing a health care institution," one cannot be "engaging in any strike . . . a health care institution" or be "engaging in any picketing . . . a health care institution." As Section 8(g) is written then, each of the three labor activities therein described needs to be followed by the preposition "at" to link it in some way to "a health care institution."

B. *The Legislative History*

At the urging of the parties, we have considered the legislative history of the hospital amendments in general, and of Section 8(g) in particular. It seems clear that these amendments to the National Labor Relations Act, enacted on July 26, 1974,[7] had as their primary purpose the inclusion of non-profit hospitals and their employees within the terms of the Act.[8] Section 8(g) suggests the further concern of assuring continued patient care during labor disputes at a

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[7] Pub. L. No. 93-360 (93d Cong. S. 3203, July 26, 1974), 29 U.S.C. §§ 152, 158, 168, 169.

[8] The Board had originally assumed jurisdiction over non-profit hospitals. *See The Central Dispensary & Emergency Hospital*, 44 NLRB 533 (1942), *enforced*, 145 F.2d 852 (D.C. Cir. 1944), *cert. denied*, 324 U.S. 847 (1945). But in 1947, the Taft-Hartley Amendments to the Wagner Act specifically excluded such hospitals from the term "employer" and hence, from the Act. The rationale was that such institutions were primarily community-oriented charities not engaged in interstate commerce. As nonprofit hospitals grew into major business enterprises, however, with revenues of almost $19 billion and employees numbering 1½ million, Congress began to rethink its position. *See* 120 Cong. Rec. 12937-38 (1974) (remarks of Sen. Williams); 120 Cong. Rec. 12941 (1974) (remarks of Sen. Taft); Vernon, *Labor Relations in the Health Care Field under the 1974 Amendments to the National Labor Relations Act: An Overview and Analysis*, 70 Nw. L. Rev. 202, 203 (1975). Thus, beginning in 1972, bills were introduced to eliminate the non-profit exemption. *See* H.R. 11357, 92d Cong., 2d Sess. (1972); H.R. 1236, 93d Cong., 1st Sess. (1973); S.794, 93d Cong., 1st Sess. (1973); S.2292, 93d Cong., 1st Sess. (1973); S.3088, 93d Cong., 2d Sess. (1974); S.3203, 93d Cong., 2d Sess. (1974); H.R. 13678, 93d Cong., 2d Sess. (1974).

health care institution.[9] It would be neatly consistent with the overall purpose of extending the protection of the National Labor Relations Act to employees of health care institutions to read this section as an attempt to regulate the newly-protected concerted activity of such employees in order to alleviate any disruption of health care resulting from such activity. It is not nearly so explainable why regulation would be extended to activity engaged in by the employees of other than the institution, activity already protected by the Act prior to passage of the health care institution amendments.

Section 8(g) made its first appearance in the 1973 proposal by Senator Taft.[9] In that version, the amendment would have (1) prohibited strikes, picketing or lockouts by "a health care institution" or a labor organization which is the bargaining representative of its employees" when a collective bargaining agreement was in effect between the two unless certain conditions were met including service of a ten-day notice of proposed action on the hospital or labor organization and the Mediation and Conciliation Service, (2) required the same procedures as a requisite to any strikes, picketing or lockouts when "a health care organization" and "a labor organization which is the bargaining representative of its employees" enter into negotiations for an initial collective bargaining agreement, and (3) made it an unfair labor practice for "any labor organization" to induce, sanction or participate in (a) any strike or work stoppage . . .

[9] S.2292, 93d Cong., 1st Sess. (1973).

"against" a health care institution, or (b) any picketing . . . "of" or "at the premises of" a health care institution, except as permitted in the two aforementioned sections. The Board would have this court find in this proposed formulation of Section 8(g) clear evidence of Congressional intent to limit labor activity by non-health care institution employees as well as health care institution employees insofar as that activity in some way relates to the hospital. It contrasts the identification of particular labor disputants in regulatory subsections (1) and (2) of the proposal, making them applicable only to activity between "a health care institution" and "a labor organization which is the bargaining representative of its employees," with the absence of any such limiting language in subsection (3)'s proscription of any other strike, picketing or work stoppage. Moreover, it calls attention to the careful inclusion in the subsection (3) proscription of strikes and work stoppages "against" or picketing "of" the health care institution —all concerned with the institution as target—*and* of picketing "at the premises of" the institution—concerned simply with the institution as the situs of the labor activity. The Board then argues that the present Section 8(g) reflects a compromise in that Congress no longer proscribes labor activity by non-health care employees directed against or occurring at the premises of a health care institution. Rather, it now regulates such activity to the same extent it does labor activity engaged in by employees of a health care institution.

We believe this to be the Board's strongest argument, and yet we must reject it. For if Congressional intent in changing from the 1973 proposed version of 8(g) to the enacted 8(g) were as the Board would have us believe, we would expect that somewhere in the Congressional hearings and debates on the hospital amendments we would find some discussion of whether labor activity by non-health care employees related to a health care institution should be proscribed or merely regulated. We have examined the debates and hearing and find no such discussion. In deed, we are struck by the complete absence anywhere in the not insubstantial legislative history of any reference whatsoever to labor activity involving non-health care employees.

The Union does not dispute that the present 8(g) is indeed a compromise focusing on regulation of labor activities related to health care institutions rather than proscription. But, it argues that the 1973 version of 8(g) insofar as it proscribed some activity, was, even in that context, meant to apply only to such activity as was engaged in by health care institution employees.[10] We believe that despite the general lang-

[10] In short, the Union suggests that the 1973 version of 8(g) was meant to allow labor activity between "a health care institution" or "a labor organization which is the bargaining representative of its employees" when (1) a collective bargaining agreement was in effect between the two, or (2) when such an agreement was being negotiated, if certain conditions were met. If a labor dispute between the *same parties* were to arise in a different context, the Union argues that subsection (3) was meant to stand for the Congressional determination that such would be considered an unfair labor practice.

uage of subsection (3), in contrast to subsections (1) and (2), the legislative history does offer some support for this position.[11]

For example, statements in the Senate debate on regulation versus proscription focus exclusively on labor activity engaged in by health care employees. Senator Javits, one of the sponsors of the presently enacted hospital amendments, in the course of the debates, stated that he had "explored intensively the question of whether any further limitation should be placed on the union's right to strike health care institutions." 120 Cong. Rec. 12939 (1974). But as his statements, in the following colloquy with Senator Cotton show, the only unions with which he proved to be concerned were those representing health care employees.

> Mr. Javits: . . . Mr. President, I am very pleased to present to the Senate today letters . . . from the four major trade unions involved in organizing hospital workers. They have assured me in writing that they endorse the use of voluntary arbitration to settle labor-management disputes which threaten to disrupt essential health services.[12] . . . .

[11] This is not to say that the support we find is particularly strong; only that it is more persuasive than that which the Board points to. Moreover, we believe that in a case such as this, where the Board is arguing for a narrowing of recognized labor rights, it has the burden of showing that such narrowing was the intent of Congress.

[12] At this point, Senator Javits read letters from the Presidents of the National Union of Hospital and Nursing Home

Mr. Cotton: Are those four labor organizations all of the labor organizations that deal with these hospital workers?

Mr. Javits: Mr. President, I would be very careful not to say all because I am always very careful about statements of fact, but they are the primary trade unions in the field.

Mr. Cotton: Any other labor organization involved would be comparatively small?

Mr. Javits: Exactly. . . .

120 Cong. Rec. 12939-40 (1974). We are of the opinion that if the Board were right that Congress, in changing the 1973 version of 8(g) to the presently-enacted version, had had as its primary intention the regulation rather than proscription of non-health care employees' labor activities, we would not find in the debates discussions, such as that cited, focusing exclusively on the activities of health care employees.

This narrowly-focused concern is further evidenced in the Senate and House Reports on Section 8(g). The reports predict two instances when 8(g) notice will not be required.

> (1) . . . a labor organization will not be required to serve a ten day notice . . . when the employer has committed unfair labor practices. . . .
> (2) Moreover, . . . the employer should remain free to take whatever action is necessary to maintain health care, but not to use the ten-day period to undermine the bargaining relation-

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Employees, the Teamsters, the Service Employees International Union and the Laborers International Union. 120 Cong. Rec. 12939-40 (1974).

> ship that would otherwise exist. For example, the employer would not be free to bring in large numbers of supervisory help, nurses, staff and other personnel from other facilities for replacement purposes. It would clearly be free to receive supplies, but it would not be free to take extraordinary steps to stock up on ordinary supplies for an unduly extended period. While not necessarily a violation of the Act, violation of these principles would serve to release the labor organization from its obligation not to engage in economic action during the course of the ten-day notice period.

S. Rep. 93-766, 4-5 (1974); H.R.Rep. 93-1051, 6 (1974). While these reports refer generally to "a labor organization," the context makes clear that the only labor organizations intended were those representing health care institution employees. For certainly, the general term "employer" refers only to the health care institution. It would make no sense to read the first predicted exemption as meaning that if, in the instant case, Thomas Electrical were guilty of an unfair labor practice such third-party wrongdoing would constitute grounds to punish St. Joseph's by depriving it of notice of proposed labor activity. The exemption only makes sense if the wrongdoing is on the part of the health care institution itself. The second exemption only adds support to this view. For an employer such as Thomas would have no interest whatsoever in maintaining health care, or in bringing in nurses and other staff. Only if "employer" is read to mean "health care institution" does the

exemption have any logical meaning. If the only sensible meaning of "employer" in the Congressional reports is health care institution, then the only sensible meaning of "a labor organization" is one representing the employees of a health care institution. Congress having intended such general words to have such specific meanings when they used them in reporting on Section 8(g), we believe that the same specific meaning was intended when the words were used in the statute itself.[13]

C. *The Interaction of Section 8(g) with Other Hospital Amendments*

In considering the scope of applicability of Section 8(g), we have found it useful to consider the amendment, not simply in isolation but, in conjunction with those other laws with which it must interact. Most significant in this regard is Section 8(d)(1) which describes the powers of the Federal Mediation and Conciliation Service in terms that make

[13] Though we generally hesitate to ascribe much weight to subsequent Congressional expressions of intent, *see United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348-49 (1963), we do note that Senator Taft, who is responsible for having introduced the original version of Section 8(g) into the hospital amendments, and who was a principal participant in the debates on the present version, has commented that it was never his intention to bring non-health care employees under the restrictions of Section 8(g). 121 Cong. Rec. S.20466 (daily ed. Nov. 19, 1975). *Contra* 121 Cong. Rec. E.6774 (daily ed. Dec. 19, 1975) (comments of Representative Quie).

clear the Service's powers are limited to situations involving employees of a health care institution.[14]

Thus, were we to accept the Board's interpretation of Section 8(g), we would be ascribing to Congress the intention of requiring any labor organization contemplating activity at a health facility to serve ten-day notice on the Federal Mediation and Conciliation Service though 8(d)(1) makes clear that the FMCS would be powerless to require meetings between the disputing parties unless employees of a health care institution were involved. We cannot believe such to have been the intent of Congress, and accordingly must interpret Section 8(g) as requiring notice of proposed labor activity, both to the FMCS and the health care institution, only when such activity is planned on behalf of employees of the institution.

Conclusion

We have not, thus far, discussed the Board's argument that the object of Congressional concern in en-

[14] Section 8(d)(1) provides in pertinent part:

> Whenever the collective bargaining involves *employees of a health care institution*, the provisions of this section 8(d) shall be modified as follows:
>
> . . . .
>
> (C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute. (Emphasis added).

acting Section 8(g) was "to insure the continuity of health care to the community and the care and well-being of patients." S. Rep. 93-766 (1974); H.R. Rep. 93-1051 (1974), or its conclusion that notice to the institution of any proposed labor activity, either directed at it by its own employees or occurring on its own premises though directed at a third party, is necessary to assure attainment of this purpose. We do not dispute that the Board has properly identified the Congressional goal to be attained through Section 8(g). But we note again that the overall purpose of the hospital amendments was to extend National Labor Relations Act protection to employees of health care institutions and that the principal concern of Congress with this change, as evidenced by the debates, was with the potential for increased disruption of health care delivery resulting from increased labor activity by employees of health care institutions now that their activities were protected. The amendments do not, however, affect employees of other than health care institutions. Accordingly, they create no increased danger of health care delivery disruption by these employees. We do not believe that Congress intended to extend the increased regulation of Section 8(g) to areas of labor activity that did not pose such increased danger as a result of the enactment of the hospital amendments. And so we cannot join in the Board's conclusion.[15]

[15] We also believe there is an argument to be made that ten-days notice of primary activity directed against a third party employer, taking place on the premises of a health care institution, is most unlikely to make any real difference in the provision of continuous patient care. We believe that most union activity by non-health care employees that does threaten continued health care will be such as to constitute illegal secondary activity already covered under Section 8(b)(4) of the Act. Admittedly, in the Senate Report on Section 8(g) there is mention in a footnote that one of the amendment's

We are mindful of the fact that a ten-day notice requirement is not an oppressive burden to place on a union. But we are also aware that any regulation imposed on a union's ability to strike or picket deprives workers of important rights. Congress has made clear that as part of the price for giving to employees of health care institutions the benefits and protection of coverage under the National Labor Relations Act, unions representing such employees will have to serve ten-days notice on the employer (and the FMCS) of any proposed labor activity. But we do not find a clear expression of intention to make this regulation applicable to unions whose activities on behalf of other employees were already covered by the National Labor Relations Act.

ENFORCEMENT DENIED

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

advantages is that its notice provision will allow for early detection of 8(b)(4) activity. S.Rep. 93-766, 4, n. 1 (1974), but the legislative history as a whole suggests that the secondary activity with which the Senate was concerned was that involving the employees of one health care institution, who would carry their protest against their own employer to the site of an institution to which their employer had moved patients.

APPENDIX B

OPINION BY JUDGE FAIRCHILD

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

January 28, 1977

Before HON. THOMAS E. FAIRCHILD, *Chief Judge*
HON. PHILIP W. TONE, *Circuit Judge*
HON. WILLIAM J. BAUER, *Circuit Judge*

No. 75-2152

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 388, RESPONDENT

Application for Enforcement of an Order of the National Labor Relations Board

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This cause came on to be heard on the transcript of the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that enforcement of the order of the National Labor Relations Board in this cause be, and the same is hereby, DENIED, in accordance with the opinion of this Court filed this date.

APPENDIX C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 30—CG—1

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 388 (ST. JOSEPH'S HOSPITAL OF MARSHFIELD, INC.)

and

THE HOFFMAN COMPANY, INC.

DECISION AND ORDER

Upon charges filed by The Hoffman Company, Inc., the General Counsel of the National Labor Relations Board, by the Regional Director for Region 30, issued a complaint on April 28, 1975, against the Respondent, International Brotherhood of Electrical Workers, Local Union No. 388, herein called the Respondent or the Union. Copies of the charge and the complaint and the notice of hearing before an Administrative Law Judge were duly served on the Respondent and the Charging Party. In substance, the complaint alleges that the Respondent violated Section 8(g) of the National Labor Relations Act, as amended, by picketing at the premises of St. Joseph's Hospital of Marshfield, Inc., herein called St. Joseph's or the Hospital, without first giving 10 days' written notice of its intent to do so to St. Joseph's and to the

Federal Mediation and Conciliation Service. The answer duly filed by the Respondent denies the commission of any unfair labor practices.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

On June 6, 1975, the Charging Party, the General Counsel, and Respondent entered into a stipulation in which they agreed that certain documents shall constitute the entire record herein [1] and that no oral testimony is necessary or desired by any of the parties. Thus, the parties expressly waived all intermediate proceedings before an Administrative Law Judge and petitioned that this case be transferred to the Board for the purpose of making findings of fact and conclusions of law and issuing an appropriate order, reserving to themselves only the right to object to the materiality or relevancy of any of the stipulated facts.

By order dated June 11, 1975, the Board approved the stipulation, transferred the proceedings to itself, and set a date for the filing of briefs. Thereafter, the General Counsel, the Charging Party, and the Respondent filed briefs, which have been duly considered by the Board.

The Board has considered the entire record herein as stipulated by the parties, as well as the briefs

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[1] The stipulated record consists of the charge, complaint, answer, the prior charge and correspondence of the Respondent with St. Joseph's, site plan, and the stipulation.

filed by the Respondent, the General Counsel, and the Charging Party, and makes the following findings and conclusions:

Findings of Fact

I. The Business of the Employers

Charging Party, The Hoffman Company, Inc., is a Wisconsin corporation engaged in the building and construction industry with its main office located at Appleton, Wisconsin. During the past 12 months, in the course and conduct of its business, the Charging Party purchased and received in Wisconsin goods and supplies valued in excess of $50,000 directly from points outside the State of Wisconsin.

Thomas Electric Service, Inc. (herein called Thomas), is engaged in electrical construction work.

St. Joseph's Hospital of Marshfield, Inc., is a private, nonprofit Wisconsin corporation located in Marshfield, Wisconsin, where it is engaged in the operation of a nonprofit hospital. During the past 12 months, in the course and conduct of its operation, St. Joseph's had gross revenues in excess of $500,000 and purchased and received at its Marshfield, Wisconsin, location goods valued in excess of $50,000 from points outside the State of Wisconsin.

The parties stipulated, and we find, that Hoffman Company and St. Joseph's are now, and at all times material herein have been, employers engaged in commerce or in an industry affecting commerce within the meaning of Section 2(6) and (7) of the Act, and that St. Joseph's is now, and at all times material herein has been, a health care institution as defined in Section 2(14) of the Act. We further find that it will effectuate the purposes of the Act to assert jurisdiction in this proceeding.

II. The Labor Organization Involved

The parties stipulated, and we find, that the Respondent is now, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *The Issue*

The question presented is whether the Respondent violated Section 8(g) of the Act by picketing Thomas at a reserved gate at the hospital premises without first giving 10 days' written notice of its intent to do so to St. Joseph's and to the Federal Mediation and Conciliation Service.

B. *The Stipulated Facts*

In September 1974 the Charging Party, pursuant to a contract with St. Joseph's, began construction of a laboratory project. The laboratory building came to be attached to the hospital in the course of construction and will, upon completion, be permanently attached by a common wall and corridor. In connection with the laboratory project, St. Joseph's let a direct contract to Thomas, and pursuant to its contract with St. Joseph's, Thomas has at all times material herein been engaged at the laboratory project in electrical construction work.

Commencing on or about February 11, 1975, and continuing until the date of the stipulation herein, the Respondent has picketed Thomas at the hospital premises with signs reading:

> I.B.E.W.
> International Broth. of Elec. Workers
> L.U. # 388
> Our only dispute is with the substandard wage, substandard benefits paid to employees of Thomas Electric

At no time has the Respondent served written notice on either St. Joseph's or the Federal Mediation and Conciliation Service of its intent to engage in such picketing.

There is no allegation that any hospital employees ceased work or that the Respondent's picketing had any adverse impact on the Hospital's ability to provide its customary medical care.

On April 1, 1975, the Charging Party filed the instant charges alleging that the Respondent, by engaging in the picketing as described above, violated Section 8(g) of the Act.

C. *Concluding Findings*

The issue posed by this case was recently considered and determined by the Board in *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 630, AFL-CIO (Lein-Steenberg)*,[2] and *Laborers' International Union of North America, AFL-CIO, Local Union No. 1057*

[2] 219 NLRB No. 153 (1975).

(Mercy Hospital of Laredo).[3] Accordingly, for the reasons set forth in those decisions, we find that, by picketing Thomas on the premises of St. Joseph's Hospital without first giving 10 days' notice of its intent to do so to the Hospital and to the Federal Mediation and Conciliation Service, the Respondent violated Section 8(g) of the Act.

IV. The Effects of the Unfair Labor Practice Upon Commerce

The activities of the Respondent set forth above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. The Remedy

Having found that the Respondent has engaged in and is engaging in unfair labor practices in violation of Section 8(g) of the Act, we shall order that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

On the basis of the foregoing findings of fact and on the entire record in this case, we make the following:

Conclusions of Law

1. The Hoffman Company, Inc., and St. Joseph's Hospital of Marshfield, Inc., are engaged in com-

[3] 219 NLRB No. 154 (1975).

merce within the meaning of Section 2(6) and (7) of the Act.

2. St. Joseph's Hospital of Marshfield, Inc., is a health care institution within the meaning of Section 2(14) of the Act.

3. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

4. By picketing Thomas Electric Service, Inc., at the premises of St. Joseph's Hospital without first giving 10 days' written notice to St. Joseph's and to the Federal Mediation and Conciliation Service, the Respondent has violated Section 8(g) of the Act.

5. The foregoing unfair labor practice is an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, International Brotherhood of Electrical Workers, Local Union No. 388, Marshfield, Wisconsin, its officers, agents, and representatives, shall:

1. Cease and desist from engaging in any strike, picketing, or other concerted refusal to work at the premises of St. Joseph's Hospital of Marshfield, Inc., or any other health care institution, without notifying in writing St. Joseph's Hospital of Marshfield, Inc., or such other health care institution, and the Federal Mediation and Conciliation Service, not less than 10 days prior to such action, of that intention.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act:

(a) Post at its business offices and meeting halls copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 30, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Furnish to the Regional Director for Region 30 enough signed copies of the aforesaid notice for posting by The Hoffman Company, Inc., Thomas Electric Service, Inc., and St. Joseph's Hospital of Marshfield, Inc., if they are willing, in places where notices to their employees are customarily posted.

(c) Notify the Regional Director for Region 30, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

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[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, D.C. Sep. 25, 1975.

/s/ Betty Southard Murphy
BETTY SOUTHARD MURPHY
Chairman

/s/ John A. Penello
JOHN A. PENELLO
Member
NATIONAL LABOR RELATIONS BOARD

[SEAL]

MEMBER JENKINS, dissenting:

For the reasons expressed in my dissents in *Lein-Steenburg*, supra, and *Mercy Hospital of Laredo, supra*, I would dismiss the complaint here.

Dated, Washington, D.C. Sep. 25, 1975

/s/ Howard Jenkins, Jr.
Member
NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT engage in any strike, picketing, or other concerted refusal to work at the premises of St. Joseph's Hospital of Marshfield, Inc., or any

other health care institution, without notifying in writing St. Joseph's Hospital of Marshfield, Inc., or such other health care institution, and the Federal Mediation and Conciliation Service, not less than 10 days prior to such action, of that intention.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
LOCAL UNION NO. 388
(Labor Organization)

Dated ———— By ————————————
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Commerce Building, Second Floor, 744 North Fourth Street, Milwaukee, Wisconsin 53203, Telephone 414—224-3866.

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APPENDIX D

PLUMBERS, LOCAL 630—
(Lein-Steenberg)

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL 630, AFL-CIO, Stuart, Fla. *and* LEIN-STEENBERG, Case No. 12-CG-3, July 30, 1975, 219 NLRB No. 153

Before NLRB: Murphy, Chairman; Fanning, Jenkins, Kennedy, and Penello, Members.

HOSPITAL PICKETING Sec. 8(g)

—Notice of intent to picket premises of health care institution § 52.346 § 44.051 § 42.20 § 36.501

Union that had labor dispute with subcontractor performing expansion and alteration work at hospital violated LMRA when it picketed subcontractor at gate reserved for subcontractor's employees at hospital premises without first giving 10 days' notice to hospital and Federal Mediation and Conciliation Service, even though picketing did not disrupt services offered by hospital, since legislative history and plain language of legislation proscribing picketing at

health care institutions in absence of proper notices indicate that Congress intended legislation to apply to any picketing at any health care institution, not only to picketing which is directed against health care institution or which has immediate adverse impact on institution's ability to provide health care service. It is unnecessary to hold hearing, union having conceded that picketing occurred.

Lein-Steenberg is a general contractor in the building and construction industry. Don Taylor Mechanical, Inc. (Taylor) is engaged in mechanical, plumbing, and air-conditioning contracting. Martin Memorial Hospital Association, Inc., operates a nonprofit hospital in Stuart, Fla.

[*Text*] The question presented is whether Respondent violated Section 8(g) of the Act by picketing Taylor at a reserved gate at the hospital premises without first giving 10 days' written notice of its intent to do so to Martin Memorial and to the Federal Mediation and Conciliation Service * * *

In December 1973 Lein-Steenberg, pursuant to a contract with Martin Memorial, began working on expansion and renovation of the existing hospital facilities, including the addition of a third and fourth story and the "shelling-in" of a fifth and sixth story on the existing patient tower, the construction of a new two-story ancilliary services building, the remodeling and expansion of the ground floor in and adjacent to the existing patient tower, and construc-

tion of a new mechanical and electrical services building.

Taylor, who was and is a nonunion contractor, has a subcontract valued at approximately $2 million with Lein-Steenberg to perform mechanical work on the alteration and construction project at the hospital jobsite. Prior to commencing construction at the Martin Memorial project, Lein-Steenberg established three properly marked reserved gates, allocating two of these gates for its own use and setting aside the third gate solely for use by Taylor.

At all times material herein Respondent has had a labor dispute with Taylor but did not and does not have any dispute with Martin Memorial, Lein-Steenberg, or any other contractor performing work at the hospital jobsite. Commencing on or about September 16 and continuing until October 21, Respondent picketed Taylor at the gate reserved for Taylor's use, with signs stating:

"Notice to the Public. Don Taylor Mechanical, Inc., Lowers Our Standards. We have no dispute with any other employer. This is not intended to stop work or deliveries. UA Local Union 630."

Respondent's picketing of Taylor at the Martin Memorial jobsite was visible to some hospital employees during their working day, but Martin Memorial employees did not use the reserved gate as an entry point to the Hospital and were not required to cross the picket line in order to gain access to the Hospital. No Martin Memorial employees, engaged in a work stoppage or other refusal to work as a result of the picketing, and there has been no disruption

of any of the services offered by the Hospital. However, during the course of the picketing employees of Lein-Steenberg and various other union subcontractors performing work at the jobsite, including individuals classified as ironworkers, operating engineers, carpenters, electricians, and laborers, elected from time to time to honor the picket line established by Respondent against Taylor. At no time did Respondent give notice of its intent to picket Taylor to either Martin Memorial or to the Federal Mediation and Conciliation Service.

Contentions of the Parties: The General Counsel contends that the Union violated Section 8(g) of the Act by failing to notify the Hospital and the Federal Mediation and Conciliation Service of its intent to picket Taylor at least 10 days before such picketing began, arguing that the plain language of that section proscribes *any* picketing *at* any health care institution in the absence of proper notices. Respondent contends, to the contrary that the intention of Congress in enacting the hospital amendments, as revealed in the legislative history, was twofold; i.e., to extend coverage of the Act to employees of nonprofit hospitals and to minimize disruption of patients care in the event of a labor dispute involving a health care institution. Respondent argues that neither purpose would be served by finding a violation of Section 8(g) in the instant case and that, therefore, the complaint should be dismissed.

Discussion: In 1974 Congress enacted, and the President signed, the so-called hospital amendments to

the Act.[5] These amendments deleted from Section 2(2) of the Act the exemption of nonprofit hospitals from the definition of "employer" and added Section 2(14) which defined a new category of employers, termed "health care institutions," to include, as noted above, all hospitals. The amendments further contained, in Section 8(g) special notice requirements as follows:

"A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution in writing and the Federal Mediation and Conciliation Service of that intention. . . . The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties."

As stated, the issue presented here is whether Respondent's otherwise lawful primary picketing of Taylor at a reserved gate violates Section 8(g) solely because the picketing occurred at the premises of a health care institution and proper notices were not given. Essentially, we are called upon to determine for the first time whether Congress intended Section 8(g) to be read literally so as to apply to any picketing at any health care institution or whether the intent of Congress was that the section apply only to picketing directed *against* a health care institution

[5] Public Law 93-360, 93d Cong., S. 3203, 88 Stat. 395, effective August 25, 1974.

or which has an immediate adverse impact on the institution's ability to provide health care services.

Respondent urges that the intent of Section 8(g), as revealed by its legislative history, was to minimize disruptions in patient care caused by labor disputes, and that the likelihood of such disruptions here was virtually nonexistent. Indeed, Respondent emphasizes that no Martin Memorial employees engaged in a work stoppage or other refusal to work as a result of the picketing, and there was no disruption of or interference with any of the services offered by the Hospital.

Respondent further contends that, even if there were some possibility of disruption, the amendments were not intended to interfere with otherwise lawful primary picketing of a contractor at a common situs, even though such situs happen to be a health care institution. In this connection, Respondent points to the fact that the building trades unions were not invited to testify at the congressional hearings as to the possible impact the amendments might have upon their right to engage in lawful common situs picketing. Accordingly, Respondent argues, no violation of Section 8(g) should be found in the circumstances of this case. We disagree.

We agree with Respondent's major premise that Congress intended by enacting the hospital amendments to extend the protection of the Act to some 1.5 million employees[6] previously excluded from its coverage, while also protecting the public against undue disruptions in health care services caused by labor

[6] S. Rept. 93-766, 93d Cong., 2d Sess. (1974).

disputes. We are particularly mindful of the following from the Senate committee's report on the measure:

"In the Committee's deliberations on this measure, it was recognized that the needs of patients in health care institutions required special consideration in the Act including a provision requiring hospitals to have sufficient notice of any strike or picketing to allow for appropriate arrangements to be made for the continuance of patient care in the event of a work stoppage."[7]

We further recognized that the legislative history of this section does not contain any specific references to reserved gate picketing of a contractor or subcontractor at a functioning hospital construction site. However, we cannot agree with Respondent that the lack of such references indicates that Congress did not intend Section 8(g) to apply in these circumstances. Rather, there is ample support in the legislative history that Congress intended the words "any . . . picketing . . . at any health care institution" to cover all picketing at the premises of such an employer. Thus, for example, Senator Taft explained that: "This subsection applies not only to bargaining strikes or pickets, but also, as stated in the statute, to *any* picket or strike.'"[8] (Emphasis supplied.) Similarly, Senator Javits pointed out that: "10 days notice of any strike or picketing, including stranger picketing must be given to a health care institution."[9]

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[7] Ibid.

[8] 120 Cong. Rec. S6941 (daily ed., May 2, 1974).

[9] 120 Cong. Rec. S6935 (daily ed., May 2, 1974).

It also appears to us that if Congress had intended to exempt some types of picketing from the requirements of Section 8(g) the wording of that section would have specified the circumstances in which it was to be applied. In this connection, we especially note Senator Williams' injunction during the Senate debates that:

"This legislation is the product of compromise, and the National Labor Relations Board in administering the act should understand specifically that this committee understood the issues confronting it, and went as far as it decided to go and no further and the Labor Board should use extreme caution not to read into this act by implication, or general logical reasoning—something that is not contained in the bill, its report and the explanation thereof."[10]

From all of the above, we conclude the Congress intended us to interpret Section 8(g) according to its plain language and that, therefore, *any* strike or picketing at the premises of a health care institution, even primary reserved gate picketing directed at a subcontractor, is proscribed in the absence of proper notices.[11]

Our dissenting colleagues take issue with this interpretation, citing rules of grammar and portions of the legislative history. They particularly rely on the

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[10] 120 Cong. Rec. S12104 (daily ed., July 10, 1974).

[11] The fact that representatives of the building trades unions did not testify on the bill does not indicate to us that Congress did not intend Sec. 8(g) to apply to picketing such as that involved in this case.

testimony of then Under Secretary of Labor Schubert at the Senate hearings on the bills which were the precursors of the health care amendments, Schubert testified that under a provision of the bill he recommended

"a 10-day strike notice would be required before a union could go on strike *against* a private health care facility. . . ." [12] [Emphasis supplied.]

According to the dissent, this statement indicates that Congress intended the proscription in Section 8(g) as eventually enacted to apply only to actions directed against a health care institution. To the contrary, in our view, had Congress intended to limit only conduct *against* a health care institution, Congress would have utilized that word or a similarly qualified preposition. We find that the failure to sue Schubert's wording is another indication that Congress did not choose to limit Section 8(g) as our colleagues suggest. Moreover, unlike the dissent, we see no anomaly in finding that the first portion of that section may apply to strikes or picketing which do not involve health care institution employees while the scope of the second portion is more limited. The first part refers to "any strike or picketing." The second portion is specifically limited by Section 8(d) so as to apply only to cases concerning "collective bargaining [which] involves employees of a health care institution." Indeed, the fact that Congress in one amended section of the Act, Section 8(d) explicitly

[12] Hearings on S. 794, S. 2292, before the Subcommittee on Labor of the Committee on Labor and Public Welfare, 93d Cong., 1st Sess. 3 (1973).

limited the scope of the changes to employees of health care institutions further buttresses our conclusion that if Congress had intended to qualify the application of the first portion of Section 8(g) that intention would have been made clear.

Furthermore, if we interpret Section 8(g) as exempting the picketing herein because such picketing did not in fact disrupt the services offered by the Hospital, we might well set a troublesome precedent requiring us, in each case involving application of Section 8(g), to determine whether the potential for disruption of medical services was sufficiently serious to warrant a finding that the notices are required. We are not convinced that such a case-by-case analysis was within the intent of Congress. Rather, while we agree with Respondent that the purpose of Section 8(g) is to minimize disruption of health care services in the event of a labor dispute, it appears to us that Congress viewed *any* strike or picketing *at* the premises of a health care institution as constituting sufficient potential for disruption of medical care to require notice to the institution and to the Federal Mediation and Conciliation Service.

Finally, we are of the view that our interpretation of that statute in the manner set forth above does not appear to impose any undue burden or hardship on labor organizations which, like Respondent here, are engaged in performing construction work at the site of a functioning health care institution. Indeed, we note that Respondent has not argued otherwise in its brief to the Board.

We acknowledge that in some circumstances, such as those presented by Casey & Glass, Inc., 219 NLRB No. 155, 99 LRRM 1779 (1975), our decision may lead to a loss of employee status by individuals who, although not employed by a health care institution, engage in a proscribed strike at such institution. These employees are indeed innocent victims of their labor organization's failure to provide the requisite 8(g) notices. However, Congress, by its amendment to Section 8(d),[13] obviously intended this very result when it chose to deprive such strikers of their employee status rather than devising some other sanction against the offending union.

Furthermore, we are convinced of the ability of labor organizations to recognize and fulfill their responsibility to provide proper and timely notices before commencing a strike or picketing at the premises of a health care establishment and to caution employees whom they represent not to engage in proscribed activity. Moreover, we are certain that as labor organizations gain awareness of their obligations in this area the giving of notices will become a pro forma procedure much as the giving of notices of termination of collective-bargaining agreements is now.

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[13] The pertinent portion of Sec. 8(d), as amended, provides:

"Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended. . . ."

Accordingly, for all of the reasons discussed above, we find that Respondent by picketing Taylor at the Martin Memorial jobsite without first giving the required notices, violated Section 8(g) of the Act.[14]

FANNING and JENKINS, Members, dissenting:

[*Text*] For a number of reasons, we do not believe violations of Section 8(g) have occurred in this case and its companion Mercy Hospital of Laredo, similarly decided this day. Because we do not believe the implications of the majority's determination in the instant case can be fully understood without resort to the determinations made in Mercy Hospital and Casey & Glass, Inc., the representation proceeding accompanying Mercy Hospital, we shall treat all three cases together.

These three cases are the first cases decided by the Board involving the interplay of the amended Section 8(d) and the new Section 8(g) of the Act. And yet Lein-Steenberg is being decided without hearing, based on a stipulated record and Mercy Hospital is

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[14] Our dissenting colleagues contend that we erred in not directing a hearing in this case and its companions, Mercy Hospital of Laredo, 219 NLRB No. 154, 89 LRRM 1777, and Casey & Glass, Inc., supra, issued today. However, because we hold for the reasons stated above that any picketing or strike by a labor organization at the premises of a health care institution falls within the proscription of Sec. 8(g) and inasmuch as in all of these cases the labor organizations involved conceded that such picketing occurred, we find it unnecessary to order hearings.

being decided without hearing, based on General Counsel's motion for summary judgment. Such procedures may, perhaps, facilitate the administrative responsibilities the Board bears, but, because a complete record invariably presents more fully developed factual and legal considerations, we do not believe such procedures are properly invoked when, as here, we are called upon to decide the very first cases arising under a new section of the Act. This would be the case even if the facts were as clear as the majority would lead one to believe. The proposition becomes unassailable when they are, in several respects, in doubt.

We will give but two examples. In Lein-Steenberg there is a clear conflict in the precise location of the pickets. According to the "Aerial Site Plan" incorporated into the "record" the picketing took place almost totally *off the hospital premises*, some 125 feet from the gate reserved for the subcontractor Taylor's employees. What minor portion took place on hospital premises was some 100 feet from the gate and was even further away from all access roads and gates used by the hospital's employees. In Mercy Hospital, there is an allegation on respondent's part that the general contractor, Casey & Glass, purposely entangled the hospital [16] in the dispute and deliberately

[16] We think it worthy of mention that in Lein-Steenberg, besides the admission that the picketing had absolutely no effect on the hospital's operations, the hospital did not file the charge involved and, in no way, has participated in these proceedings.

placed the gate reserved for its employees "adjacent to the emergency room" to create 8(g) consequences.

In both Lein-Steenberg and Mercy Hospital, and we stress this point, the questions that come to mind because of lack of factual clarity may not necessarily portend a result different than the one reached by the majority, but such questions do form an integral part of the deliberative process which hopefully results in a *considered* judgment. Moreover, even if we assume such procedures are properly invoked, there are considerations of magnitude at work in these cases which, from the majority's silence, we can only conclude have not been considered. In the course of this dissent we will explore the more significant considerations but, at the outset, we must emphasize that a decision which proximately causes nine employees of Casey & Glass to lose their jobs and right to reinstatement, as does the instant decision, should at least consider that fact in the course of the decision. But all that appears "considered" in these cases is whether "any picketing" has occurred "at the premises" of the health care institutions involved. Which brings us to the heart of the matter.

There are two fundamental flaws in the majority opinion, as we view the matter. First, while the majority suggests a "literal" reading of Section 8(g) requires the result reached, we do not believe a truly literal reading of Section 8(g) has been undertaken. Second, and more important, even if the majority is correct in its literal reading of Section 8(g), such a reading does not compel the result reached if Section

8(g) was not intended by Congress to reach that result and we do not agree with the majority's evaluation of that congressional intent.

With regard to the majority's literal analysis of Section 8(g), a violation has been established, we are told, by virtue of Respondents' "picketing . . . at any health care institution," whether or not the health care institution is involved in the labor dispute which generated the picketing or refusal to work. The opening lines of Section 8(g) read in full:

"A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution. . . ."

The majority assumes the word "at" necessarily means "at the premises," [17] no doubt to overcome the assertion that the employees involved in these cases were not picketing at the hospitals but rather at the gates of their employers. Without questioning that interpretation, why is the word "at" necessarily associated with the phrase "any health care institution" rather than with the phrase "concerted refusals to

[17] Note the inherent vagueness of the term "premises" in this regard. Suppose there is a health care facility, e.g., a small clinic, on one of the floors of a building which houses numerous other nonhealth-related employers. What is the "premises" of the clinic? Does it encompass the elevators which its employees also use, the common entrances, and the hallways? In some large buildings, we would suspect, there are employees who do not even know whether the building houses what this Board would find to be a "health care institution." If they decide to picket their nonhealth facility employer, must they, on penalty of possibly losing their jobs, file a 10-day notice?

work"? We do not mean to belabor the point, but the intransitive nature of the verb "work" *requires* the usage of a preposition. One can "picket" a health care institution but not "refuse to work a health care institution." Thus if Congress had chosen not to include a prohibition against "other concerted refusals to work" but rather had limited itself to prohibiting striking and/or picketing, the word "at" would not be necessary. In fact, in the committee reports accompanying the legislation and in the remarks of Senators Williams and Cranston on the Senate floor describing the 8(g) prohibitions, there is no reference to "other concerted refusals to work" but only to picketing and striking. Significantly, Section 8(g) is then described as prohibiting "striking or picketing *a* health care institution." [18] The importance of the word "at," utilized as it is merely to conform to the dicates of the language, thus, diminishes in our view. Note further the "literal" meaning of the conclusion of Section 8(g):

"except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection *shall not be given until the expiration of the period specified in clause (B) of the last sentence of section 8(d) of this Act.* The notice shall state the date and time that such

[18] See S. Rept. 93-766, 93d Cong., 2d Sess. 4 (1974); H. Rept. 93-1051, 93d Cong., 2d Sess. 5 (1974) (hereinafter Reports). See also 120 Cong. Rec. S6932 (remarks of Sen. Cranston), 6934 (remarks of Sen. Williams) (daily ed. May 2, 1974).

action will commence. The notice, once given, may be extended by the written agreement of *both parties*." [Emphasis supplied.]

The last sentence of Section 8(d) begins "[w]henever the collective bargaining involves *employees of a health care institution*, the provisions of this section 8(d) shall be modified as follows. . . ." The clause (B) of Section 8(d) to which Section 8(g) refers states that in cases of initial bargaining following recognition or certification the labor organization (which, when one recalls the final sentence of Section 8(d) quoted above, can only mean the labor organization representing the employees of the health care institution), must provide for at least 30 days' involvement of the Federal Mediation and Conciliation Service (FMCS) and any state agency established for such purposes in the initial contract negotiations. The "exception" of Section 8(g) thus can apply only to labor organizations representing *health care institution employees*. The majority concedes as much when it states that "the second portion [of 8(g)] is specifically limited to Section 8(d) so as to apply only to cases concerning "collective bargaining [which] involves employees of a health care institution.'" However, the final sentence of Section 8(g) allows for extensions of the notice by written agreement of "both" (not "all") parties. We trust that the majority does not include this final sentence of Section 8(g) within the bounds of what it calls "the second portion" of Section 8(g)—to do so would necessarily mean Section 8(g) provides, under the majority's view, no statutory provision for extensions of time in cases involving, as the instant ones do, *non*-health care employers. Thus, by its own words, the majority's "literal" reading of 8(g) results in that section's being divided into three parts. First, *any* labor organization, no matter whom it represents or seeks to represent, must file a 10-day notice before picketing "at" any health care institution even though the employer being picketed is not a health care facility or involved in providing patient care. The second part of Section 8(g), the initial bargaining exception, is clearly limited, as the majority acknowledges, to labor organizations representing health care institution employees. Finally, the third part of Section 8(g), its final sentence, applies, once again, to *all* labor organizations, not just those representing health care institution employees.[19] In sum, the majority concludes that Congress wrote Section 8(g) with *all* labor organizations in mind for the first 45 and final 14 words of that section but limited the intervening 59 words to *some* labor organizations.

The majority's understanding of legislative draftsmanship is the product of its analysis of the legislative history. As indicated earlier, that analysis leaves much unsaid. Assuming the majority's literal reading of Section 8(g) is correct:

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[19] A further anomaly in the majority's interpretation of Sec. 8(g): in the instant cases the labor organizations involved could extend commencement of the work stoppages by reaching written agreement with the hospitals and without ever having to notify *their own employers*, since such agreements are made by *both*, not *all*, parties.

"It is a 'familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intentions of its makers.'" [Citation omitted.][20]

The 10-day notice in Section 8(g) was first proposed by then Under Secretary of Labor Schubert, testifying, in August 1973, on S.794 and S.2292[21] before the Senate Subcommittee on Labor. He suggested as amendments to S.794, a bill which simply deleted the former-language of Section 2(2) of the Act excluding nonprofit hospitals,[22] that, inter alia.

". . . FMCS participation should be statutorily mandated upon the request of any party to a health care industry labor dispute. When there is a strike, or notice of intent to strike, FMCS participation should be mandated, whether or not any of the parties request its presence. In addition a 10-day strike notice would be required before a union could go on strike *against* a private health care facility. . . . We believe these provisions should go a long way toward

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[20] National Woodwork Manufacturers Association v. N.L.R.B., 386 U.S. 612, 619, 64 LRRM 2801 (1967).

[21] Introduced by Senators Cranston and Taft, respectively. Neither bill was reported out of committee. The amending legislation, with the exception of two House amendments, was substantially the result of Senator Williams' bill, S. 3203, introduced in March 1974 and H.R. 13678, introduced in the House at the same time by Representatives Thompson and Ashbrook.

[22] See Hearings on S. 794, S. 2292 before the Subcommittee on Labor of the Committee on Labor and Public Welfare, 93d Cong., 1st Sess. 3 (1973).

helping health care institutions and *their* employees settle *their* disputes responsibly and peacefully, while not significantly restricting *either party's* freedom of action." [23] [Emphasis supplied.]

That Section 8(g) was not intended to encompass disputes between nonhealth care industry parties is supported by a reading of the Committee Reports accompanying the legislation:[24]

"[8(g)] generally prohibts a labor organization from striking or picketing a health care institution without first giving 10 days notice.

"Repeatedly serving such ten-day notices upon the *employer* is to be construed as constituting evidence of a refusal to bargain in good faith by a labor organization.[25]

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[23] Id. at 428, 429. The significance of then Under Secretary Schubert's testimony cannot be overemphasized. With the exception of the new Sections 19 and 213 *all* his proposals were eventually embodied in the recent amendments or the Committee Reports accompanying the legislation. In addition, *all* his recommendations *against* other proposals, most notably the proposals to statutorily restrict the number of bargaining units the Board could designate appropriate in the health care industry and to statutorily exempt certain States from the coverage of the amendments because of their preexisting labor laws covering employees of nonprofit hospitals, were omitted from all subsequent legislation introduced via committee. It is a matter of congressional record that Schubert and other Department of Labor staff worked closely in the preparation of the legislation ultimately enacted. See 120 Cong. Rec. S6940 (daily ed., May 2, 1974—letter of Secretary Brennan).

[24] Reports, fn. 18 supra, 4-5 (Senate), 5-6 (House).

[25] It is crystal clear that the "employer" referred to in the Committee Reports is the health care institution. E.g., ". . .

"[A] labor organization will not be required to serve a ten-day notice or to wait until expiration of the ten-day notice when the *employer* has committed unfair labor practices as in Mastro Plastics Corp. v. N.L.R.B., 305 U.S. 270, 37 LRRM 2587 (1956).

This latter comment in the Reports is expecially significant when one considers its relation with the cases at hand. If Taylor or Casey & Glass had committed violations of Section 8(a)(3), the Respondents would be relieved of the duty to serve the 8(g) notice required by the majority. It indeed seems strange that Congress, in its interest to give an added protection to the health care institution's delivery capabilities would allow a construction contractor's unfair labor practice to overcome that design.

The interpretation the majority gives to other legislative history is questionable. Senator Taft's remark that Section 8(g) would apply not only to "bargaining strikes" but to "any picket or strike" does not necessarily mean more than that Section 8(g) prohibits, in addition to bargaining strikes *against a hospital*, any other picketing or striking *against a hospital*, such as recognitional or jurisdictional picketing or strikes. This interpretation is supported by other remarks of Senator Taft:

"Finally, the health care institution must be given a 10-day notice by a labor organization before any

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the employer should remain free to take whatever action is necessary to maintain health care,"—a freedom we would, with all due respect, hardly entrust to the construction industry.

picketing or strike—whether or not related to bargaining—can take place. . . I believe these safeguard procedures will substantially aid health care institutions and *their* employees, settle *their* disputes while not significantly restricting *either party's* freedom of action." [26] [Emphasis supplied.]

Senator Javits' reference to "stranger picketing," cited by the majority, merely means, as we understand the term, picketing by employees of a labor organization.[27] We know of no support for the majority's apparent interpretation that it refers to picketing at the premises of a stranger to the dispute.

The majority notes that the fact that representatives of the building trades did not testify on the scope of Section 8(g) "does *not* indicate . . . that Congress did *not* intend Section 8(g) to apply to picketing such as that involved in this case." [28] But, in attempting to determine the intent of Congress, such considerations are of value, the pertinent question being whether that absence of testimony on Section

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[26] 120 Cong. Rec. 12108 (daily ed., July 10, 1974). When one recalls Under Secretary Schubert's clear limitation that Sec. 8(g) would prohibit, in the absence of notice, striking or picketing *against* health care institutions, the similar close of his quoted remarks at fn. 23, supra, with the close of Senator Taft's quoted remarks takes on added meaning.

[27] "Picketing by individuals who are not employees of the company being picketed. Usually they belong to the union which is seeking to organize employees in the plant." "Roberts' Dictionary of Industrial Relations," 512 (1971). "Picketing in which non-employees are used." (Casselman, "Labor Dictionary." 445 (1949).

[28] Its fn. 11, supra (emphasis supplied).

8(g) *does* provide some indication whether Congress *did* intend Section 8(g) to encompass the activity involved in these cases. We say this because we cannot conceive Congress intending the result reached here not only without seeking the testimony of the building trades, but without commenting at all on the Board's Moore Dry Dock [29] standards, without a mention of the monumental increase in the workload of the Federal Mediation and Conciliation Service caused by the result reached here,[30] and without any indication that Congress intended, practically speaking, to impose a new requirement on all the labor organizations who represent or seek to represent employees of the countless employers who might transact business "at the premises" of all the "health-care institutions" across this country. These are, we submit, considerations of value in arriving at Congress' intention.

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[29] Sailors' Union of the Pacific, AFL (Moore Dry Dock Company), 92 NLRB 547, 27 LRRM 1108 (1950).

[30] FMCS must also be furnished a copy of the 8(g) notice. If FMCS is to become potentially involved in the myriad of disputes that may occur *at all* health care facilities, in all the potential disputes between the innumerable suppliers and their employees following the delivery, in all the spontaneous disputes that may erupt at every health facilities construction site, without regard to the participants in the dispute, no matter how unrelaed to the workings of the health care facility itself and no matter how unlikely the potential for disruption, one would think that at least a sentence or two in the legislative history would be devoted to this hundredfold increase in the responsibilities of FMCS.

So too are considerations surrounding our historic approach regarding limitations on the right to engage in concerted protest. The majority states that "if Congress had intended to exempt some types of picketing from the requirements of Section 8(g), the wording of that section would have specified the circumstances in which it was to be applied." That is a remarkable observation from our colleagues, flying, as it does, in the face of the unaltered Section 13 of the Act:

"Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right."

Section 13 constitutes "a rule of construction which cautions against expansive reading . . . which would adversely affect the right to strike, unless the Congressional purpose to give it that meaning persuasively appears either from the structure or history of the statute. Therefore, § 13 is a command of Congress to the courts to resolve doubts and ambiguities in favor of an interpretation . . . which safeguards the right to strike as understood prior to the passage of the [amendments]." [31]

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[31] N.L.R.B. v. Drivers, Chauffeurs, Helpers, Local Union No. 639, IBT [Curtis Bros., Inc.], 362 U.S. 274, 282, 45 LRRM 2975 (1960). Via the majority's observation, a different result than that reached by the Supreme Court would be required in Local 761, International Union of Electrical, Radio & Machine Workers, AFL-CIO [General Electric Company]

We are convinced that the real underpinning of the majority's determinations in these cases is found in its view that the results reached do "not appear to impose any undue burden or hardship" on those labor organizations involved at health care facility premises. We have two serious reservations on the worth of that judgment. First and foremost, while the labor organizations involved may not face an undue hardship, that fact is little comfort to the employees of Casey & Glass who, after a lengthy recognitional struggle culminating in a Board election, have now lost their jobs and right to reinstatement because of the requirements of Section 8(d) which states that any employee who engages in a strike within the 8(g) period has lost his "employee" status for the purposes of Sections 8, 9, and 10 of the Act. Secondly, while the majority's result may, in fact, be a "good" result, it begs the question whether this Board has the right to reach it. "To say 'there ought to be a law against it' does not demonstrate the propriety of the NLRB's imposing the prohibition." [32] Simply because the majority feels that without imposing any undue burden upon a labor organization it can give added protection to health care institutions, the premises of which may

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v. N.L.R.B., 366 U.S. 667, 48 LRRM 2210 (1961), since Sec. 8(b)(4)(A), as the Court observed, literally bans almost all strikes and Congress did not specify in the wording of that section any exemptions.

[32] Cox, "The Duty to Bargain in Good Faith," 71 Harv. L. Rev. 1401, 1437, quoted with approval in N.L.R.B. v. Insurance Agents' International Union, AFL-CIO, 361 U.S. 477, 496, fn. 25, 45 LRRM 2705 (1960).

become the situs of completely unrelated disputes, does not comport with our understanding of this Agency's function. We conclude that Congress did not intend Section 8(g) to encompass the actively involved in these cases. We thus dissent in Lein-Steenberg, Mercy Hospital of Laredo, and Casey & Glass, Inc.

JENKINS, Member, further dissenting:

[*Text*] Construction work within the grounds occupied by a hospital, or adjacent to the hospital building as an addition would be, is not necessarily hospital work or functions, and in itself is not entitled to whatever additional protection the Act provides to hospitals. Such construction work, depending on the facts of each case, can be picketed without interfering with the adjacent hospital's own work, as innumerable cases heretofore decided in other areas by this Board demonstrate, and indeed as the facts in Lein-Steenberg show here. It is hospital functions, and not separate nearby nonhospital work, which Congress accorded special protection. Until it is established by the facts in each case that the union has not kept these different enterprises separate, I would not include within the hospital all adjacent or nearby nonhospital work done for it.

LABORERS, LOCAL 1057—
(Mercy Hospital of Laredo)

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, LOCAL UNION NO. 1057, Laredo, Tex. *and* MERCY HOSPITAL OF LAREDO and CASEY & GLASS, INC., Case Nos. 23-CG-1 and -2, July 30, 1975, 219 NLRB No. 154

Before NLRB: Murphy, Chairman; Fanning, Jenkins, Kennedy, and Penello, Members.

HOSPITAL PICKETING Sec. 8(g)

—Notice of intent to picket at premises of health care institution—Hearing § 52.346 § 44.051 § 42.20 § 36.501

Union that had labor dispute with general contractor performing expansion and renovation work at hospital violated LMRA when it picketed gate reserved for contractor at hospital premises without first giving 10 days' notice to hospital and to Federal Mediation and Conciliation Service, in view of reasons set forth in Lein-Steenberg case (89 LRRM 1770). There is no need for hearing to determine whether picketing had any actual or potential impact on hospital's ability to provide health services.

Casey & Glass is engaged in the building and construction industry. Mercy Hospital of Laredo is a nonprofit medical organization that provides emer-

gency and full and comprehensive hospital treatment and care. The issue in this case is whether the union, "by picketing Casey & Glass at a reserved gate at a construction project at the premises of Mercy Hospital without first giving 10 days' written notice of its intent to do so to the Hospital and to the Federal Mediation and Conciliation Service, violated Section 8(g) of the Act."

[*Text*] In its opposition to the General Counsel's Motion for Summary Judgment Respondent contends that a summary judgment proceeding is inappropriate because the novel issue and factual complexity presented by this case require a full evidentiary hearing. In this connection, Respondent argues that a hearing is necessary to determine whether Respondent's primary picketing of Casey & Glass at a reserved gate at the Hospital had any actual or potential impact on the Hospital's ability to provide health care services. Respondent further argues that, in the absence of a finding of such impact, no violation of Section 8(g) can be found. In the alternative, Respondent contends that Section 8(g) was intended by Congress to apply only in cases where a strike or picketing is directed *against* a health care institution and that the consolidated complaint therefore fails to allege a prima facie case and should, accordingly, be dismissed.

The Board has recently discussed and decided both issues raised by Respondent in United Association of

Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 630, AFL-CIO (Lein-Steenberg).[1] For the reasons set forth in that decision we find, with respect to Respondent's first contention, that there is no dispute concerning the facts pertinent to our determination and that, therefore, a hearing is not warranted. As to Respondent's second argument, we find that Respondent, by picketing Casey & Glass at the premises of Mercy Hospital without first giving 10 days' written notice of its intent to do so to the Hospital and to the Federal Mediation and Conciliation Service, violated Section 8(g) of the Act. Accordingly, we shall grant the General Counsel's Motion for Summary Judgment. * * *

The consolidated complaint and amended answer established, inter alia, that since on or about September 3, 1974, Casey & Glass has been engaged as general contractor in a construction project at Mercy Hospital. The project involves expansion of the Hospital and rennovation of its existing laundry facilities. The construction is federally funded in an amount in excess of $4 million.

From December 2, 1974, until December 16, 1974, and from January 6, 1975, and continuing until the date of the consolidated complaint herein, Respondent has picketed Casey & Glass at the Hospital premises with signs reading:

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[1] 219 NLRB No. 153, 89 LRRM 1770 (1975).

LABORERS INTERNATIONAL UNION
OF NORTH AMERICA
LOCAL 1057 AFL-CIO
"ON STRIKE"
AGAINST
CASEY AND GLASS, INC.

At no time has Respondent served written notice on either Mercy Hospital or the Federal Mediation and Conciliation Service of its intent to engage in such picketing.

There is no allegation that any hospital employees ceased work or that Respondent's picketing had any adverse impact on the Hospital's ability to provide its customary medical care.

On January 13, 1975, Casey & Glass and Mercy Hospital filed the instant charges alleging that Respondent, by engaging in the picketing as described above, violated Section 8(g) of the Act.

Concluding Findings: The issue posed by this case was recently considered and determined by the Board in Lein-Steenberg, supra. Accordingly, for the reasons set forth in that decision, we find that, by picketing Casey & Glass on the premises of Mercy Hospital without first giving 10 days' notice of its intent to do so to the Hospital and to the Federal Mediation and Conciliation Service, Respondent violated Section 8(g) of the Act.

FANNING and JENKINS, Members, dissenting:

[*Text*] As stated in our dissenting opinion in Lein-Steenberg,[3] issued this day, we do not believe the activity in this case falls within Congress' perception of the ambit of the new Section 8(g). Accordingly, we dissent.

It is noteworthy, we believe, that this case is being decided on the basis of a motion for summary judgment without any attempt to determine the validity of Respondent's allegation that the general contractor with whom the employees involved in this proceeding had their dispute, Casey & Glass, deliberately entangled Mercy Hospital in the recognitional dispute by placing a reserved gate "adjacent to the hospital's emergency room" and designating that gate for use by its own employees and, at the same time, placing three reserved gates at points "clearly far removed from the hospital building" and selecting the employees of its subcontractors to use those gates. Moreover, according to Respondent, Casey & Glass deliberately refused to discuss the placement of the gates or, once the gates were placed, to discuss ways to ameliorate potential effects on the hospital. As a result, according to Respondent, it voluntarily assigned only one picket to the gate and that picket carried a sign which made it crystal clear there was no dispute with the Hospital. Finally, all parties

[3] United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 630, AFL-CIO (Lein-Steenberg), 219 NLRB No. 153, 89 LRRM 1770 (1975).

concede there was absolutely no effect on the hospital's delivery capacity.

We do not, of course, know whether all these allegations can be substantiated. The point is, however, that neither do our colleagues. If they are, in point of fact, true, we see further reason to dissent from our colleagues' determination that Congress, via the health care amendments and without a word during legislative debate, intended to give a construction contractor a backdoor route for thwarting the basic Federal labor policy favoring employee organization.

APPENDIX E

The other relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. (1970 ed. and Supp. V) 151, *et seq.*) are as follows:

SEC. 2. When used in this Act—

* * * *

(14) The term "health care institution" shall include any hospital, convalescent hospital, health maintenance organization, health clinic, nursing home, extended care facility, or other institution devoted to the care of sick, infirm, or aged person.

* * * *

SEC. 8. * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided,* That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that

no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

* * * Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee

of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this section 8(d) shall be modified as follows:

(A) The notice of section 8(d)(1) shall be ninety days; the notice of section 8(d)(3) shall be sixty days; and the contract period of section 8(d)(4) shall be ninety days;

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in section 8(d)(3).

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.

The relevant provision of the Labor Management Relations Act, 1947, as amended (61 Stat. 136, 88 Stat. 396, 29 U.S.C. (1970 ed. and Supp. V) 141, *et seq.*) is as follows:

TITLE II—
CONCILIATION OF LABOR DISPUTES IN INDUSTRIES AFFECTING COMMERCE; NATIONAL EMERGENCIES

* * * *

SEC. 213. (a) If, in the opinion of the Director of the Federal Mediation and Conciliation Service a threatened or actual strike or lockout affecting a health care institution will, if permitted to occur or to continue, substantially interrupt the delivery of health care in the locality concerned, the Director may further assist in the resolution of the impasse by establishing within 30 days after the notice to the Federal Mediation and Conciliation Service under clause (A) of the last sentence of section 8(d) (which is required by clause (3) of such section 8(d)), or within 10 days after the notice under clause (B), an impartial Board of Inquiry to investigate the issues involved in the dispute and to make a written report thereon to the parties within fifteen (15) days after the establishment of such a Board. The written report shall contain the findings of fact together with the Board's recommendations for settling the dispute, with the objective of achieving a prompt, peaceful and just settlement of the dispute. Each such Board shall be composed of such number of individuals as the Director may deem desirable. No member appointed under this section shall have any interest or involvement in the health care institutions or the employee organizations involved in the dispute.

* * * *

(c) After the establishment of a board under subsection (a) of this section and for 15 days after any such board has issued its report, no change in the status quo in effect prior to the expiration of the contract in the case of negotiations for a contract renewal, or in effect prior to the time of the impasse in the case of an initial bargaining negotiation, except by agreement, shall be made by the parties to the controversy.

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